CorporateLiveWire

COMPETITION & ANTITRUST 2019

VIRTUAL ROUND TABLE

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Introduction & Contents

This roundtable looks at the role of jurisdictions across the world, including Israel, Germany and Portugal, in regard to the complex matter of competition and antitrust regulations. By consulting our expert panel, we have unfurled the common patterns of anti-competitive behaviour, brought to attention the biggest compliance mistakes that businesses make, revealed the key trends predicted for the near future and discovered what steps a company should take to ensure their mergers are approved by regulators. Read on to gain a better understanding of this important topic.

James Drakeford
Editor In Chief

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Meet The Experts

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Iris Achmon is a partner in Herzog Fox & Neeman's Antitrust & Competition Department. Iris advises large entities, and multinationals in particular, on all aspects of Antitrust and Competition Law including complex mergers, restrictive arrangements, monopolies, the Food Law and Concentration Law, as well as compliance and the day-to-day conduct of companies with high exposure to antitrust and competition laws.

Iris has extensive experience in representing entities before the Israeli Antitrust Authority and the Antitrust Tribunal. Iris has handled various procedures such as administrative fines, declarations of breach, monopoly proclamations, exemption requests and pre-rulings; in a variety of sectors including hi-tech and telecom, bio and pharma, finance, transportation, energy, infrastructures, agriculture, food and retail.

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Talya heads the Antitrust and Competition Department at Herzog Fox & Neeman. As a former Team Leader in the Israeli Antitrust Authority ("IAA") legal department, Talya has unique experience in representing clients before the IAA and the Israeli Antitrust Commissioner.

Talya regularly represents and advises large entities, international and domestic, who act in a wide range of markets and sectors. She handles large and complex economic cases regarding all antitrust issues (such as mergers of companies, monopoly and abusive of dominant position issues, cartels and restraints of trade).

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Melanie Bruneau is a partner in the firm's Brussels office. She advises on a broad range of areas in European Law. Her practice focuses on advising clients a variety of industrial sectors, including transport, and aviation, pharmaceuticals, medical devices and cosmetics, manufacturing, chemicals and IT on the legal aspects of their business activities, with a particular emphasis on regulatory compliance. Ms. Bruneau advises large multinationals on all aspects of EU competition law. She has significant experience in cartel investigations and sector inquiry investigations. Ms. Bruneau regularly advises clients on global compliance programs regarding antitrust.

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Meet The Experts

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Praised by clients for her excellent legal skills and the quality of her service, Salomé is described as "brilliant" and providing "spot-on advice on the legal issues, as well as on the required strategy to get the best results." She has been recognized as one of the top 10 "Women Who Shape Brussels" by Politico.

Clients come to Salomé for her innovative and hands-on solutions to global antitrust issues. She advises on all aspects of EU competition law, but has particular expertise and experience in global mergers and strategic alliances, high-stakes investigations and complex vertical issues. She has successfully advised clients on phase I and phase II merger cases before the European Commission and coordinated multinational merger filings all over the world. She has particular experience of the consumer and retail, TMT, life sciences and health care, financial services, and energy sectors.

Salomé serves as Vice-Chair of the Competition Policy Committee of AmCham EU and as Elected Director on the Board of the Harvard Alumni Association (HAA) in Cambridge (US).

Salomé graduated summa cum laude in law and economics from the University of Deusto (Premio Extraordinario de Licenciatura) and holds a master of laws (LL.M.) from Harvard Law School, where she was an associate fellow of the Real Colegio Complutense at Harvard. She obtained a PhD in law from the European University Institute in Florence and has been a Fulbright scholar.

Salomé is admitted to practice in Belgium and Spain.

Awards and rankings

- Acritas Star, Acritas Stars Independently Rated Lawyers
- Politico Europe, Women Who Shape Brussels
- World's Leading Competition and Antitrust Lawyers, Euromoney's Expert Guides
- Recommended lawyer, Competition Law, Who's Who Legal
- Recommended lawyer for Competition/European Law, Chambers Global
- International Law Office's (ILO) EU Competition Lawyer of the Year Client Choice Award, which recognizes those lawyers and law firms around the world that stand apart for the excellent client care they provide and the quality of their service

Q1. How is monopoly and anti-competitive behaviour determined in your jurisdiction?

Salome Cisnal De Ugarte

De Ugarte: Article 102 of the Treaty on the Functioning of the European Union (TFEU) prohibits the abuse of dominant position.

Based on the case law[1] of the Court of Justice of the European Union (CJEU) , dominance is a "position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on a relevant market, by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers".[2]

Based on the Guidance, to assess if an undertaking has a dominant position, the competitive structure of the market and the following factors shall be taken into account:

the market position of the dominant undertaking and its competitors,
the expansion and the entry, and
the countervailing buyer power.

A low market share generally shows the lack of substantial market power. Dominance is not likely in the instance of a market share below 40% in the relevant market. The higher the market share and the longer the period of time over which this market share is held, the more likely is the existence of a dominant position.[3] An undertaking with a market share of 50% can be presumed dominant in the absence of exceptional circumstances.[4]

Holding a dominant position confers special responsibility to the undertaking. If an undertaking is dominant, it is subject to Article 102 TFEU.[5]

In Article 102 TFEU, there is no exhaustive list of abusive behaviours. However, we can divide them between exclusionary and exploitative abuses. We can also distinguish a category of infringements called single market abuses.

Melanie Bruneau

Bruneau: EU competition law, and in particular anti-competitive behaviour and monopoly, is governed by the Treaty on the Functioning of the European Union ("TFEU"):

Article 101(1) of the TFEU prohibits agreements between companies which prevent, restrict or distort competition in the EU and which may affect trade between EU Member States (anti-competitive agreements). These include, for example, price-fixing or market-sharing cartels. Anti-competitive agreements are prohibited regardless of whether they are concluded between companies that operate at the same level of the supply chain (horizontal agreements) or at different levels (vertical agreements) unless they contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefits, in accordance with Article 101(3) of the TFEU.

Article 102 of the TFEU prohibits any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it. The abuse may consist in imposing unfair purchase or selling prices; limiting production; markets or technical development; applying dissimilar conditions to equivalent transactions with other trading parties; and making the conclusion of contracts subject to acceptance by the other parties of supplementary

1. Case 27/76 United Brands Company and United Brands Continentaal v Commission [1978] ECR 207, paragraph 65; Case 85/76 Hoffmann-La Roche & Co. v Commission [1979] ECR 461, paragraph 38.
2. Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, paragraph 10. (hereinafter "Guidance").
3. Guidance, paragraph 12.
4. Case C-62/86 Akzo v Commission [1991] ECR I-3359, paragraph 60.
5. Richard Whish, David Bailey: Competition Law. Oxfrod University Press, 8th edition, 2015., page 190.

Q1. How is monopoly and anti-competitive behaviour determined in your jurisdiction?

Melanie Bruneau

obligations which, by their nature, do not have a connection with the subject of such contract. In general, predatory pricing, exclusive dealing, refusal to supply can constitute an abuse. There is a dominant position whenever an undertaking can behave independently of competitors, customers and suppliers. The higher the market share of an undertaking is, the more likely the company will be considering as holding a dominant position. If a company has a market share of less than 40%, it is unlikely to be dominant. Holding a dominant position is not anti-competitive per se, however its abuse is contrary to the provisions of the TFEU. Still, a dominant undertaking might not be allowed to engage in the same commercial practices as non-dominant undertakings in order to ensure that its behaviour does not distort competition.

Article 101 and Article 102 are applied by the European Commission ("Commission") or by the national competition authorities of EU Member States, pursuant to the terms of EU Regulation 1/2003. An undertaking that has infringed competition law may be subject to fines imposed by the Commission, which shall reflect the gravity and duration of the infringement. The maximum level of fine is capped at 10% of the overall annual turnover of the company.

Talya Solomon

Solomon: In recent years, Israeli competition law demonstrates a trend of diverting from form to substance. For example, in the field of unilateral conduct, a recent reform expanded the test for dominance ("monopoly") from having over 50% market share to having "significant market power".

In the field of contractual restrictions ("restrictive arrangements"), Israeli Supreme Court's decision in *Shufersal v The State of Israel* (Criminal Appeal 5823/14 of 10 August 2015) nearly eliminated form-based tests condemning vertical agreements such as exclusivity clauses, and put the emphasis on the potential harm to competition. This trend was even further enhanced by the Israeli Competition Commissioner (the Commissioner) who recently issued, for the first time, horizontal block exemptions. This includes a self-assessment mechanism to assess the economic need for the restraint and the competitive effects of the agreement, rather than being based on form and technical parameters such as market shares and number of competitors (the formal tests in some block exemptions have not been eliminated, and now serve as safe harbours).

Q2. What are the biggest compliance mistakes businesses tend to make?

Salome Cisnal De Ugarte

De Ugarte: EU competition law rules are directly applicable in all EU Member States and they are directly enforceable by the European Commission (EC) and the national competition authorities and courts.

Big compliance mistakes can come up in connection with merger procedural rules. In several recent cases the EC fined companies for infringing the EU Merger Regulation (EUMR) and some cases are still on-going in that regard. Such an infringement could lead to a fine of as much as 10% of the worldwide turnover of the undertakings concerned.

a. Failure to notify a transaction:

If a proposed merger has a Union dimension or it has an impact in at least three Member States, it has to be notified to the EC.

Q2. What are the biggest compliance mistakes businesses tend to make?

b. Gun jumping:

When a proposed merger is notified to the EC, the transaction is automatically suspended. This is called the standstill obligation.

Salome Cisnal De Ugarte

As a general remark, corporations should make sure they comply with the standstill obligation provided for in the EUMR (i.e. prohibition of "gun jumping"). Article 7(1) of the EUMR prohibits the "implementation" of a "concentration with a Community dimension". The scope of the standstill obligation was recently clarified in the CJEU preliminary ruling in C-633/16, EY/KPMG[1] as well as in the Altice/PT Portugal[2] decision.

In this context, it was clarified that one should look at whether any measure taken by a given business may amount to partial implementation. The test includes assessing: (i) whether a given measure is inseparably linked with the intended concentration and was an immediate result of the merger agreement, (ii) whether the measure is one of the substantial competitive consequences of the merger, and (iii) whether the measure can hardly be reversed. Recent case law concerning gun jumping also includes the Canon/Toshiba Medical System.[3]

c. Providing incorrect or misleading information:

- Companies are obliged to provide correct information that is not misleading in merger investigations.
- Recent case law concerning the provision of incorrect or misleading information includes the General Electric Company/LM Wind Power Holding[4] and the Facebook/WhatsAapp[5] cases of the EC.
- In an on-going investigation, the EC is looking into whether Merck and Sigma-Aldrich have breached the EUMR by providing incorrect or misleading information during the merger investigations.[6]

d. Breach of commitments offered to secure the EC's approval of a transaction:

- The first ever investigation concerning the breach of commitments undertaken by a company is still on-going. In case Telefonica Deutschland / E-plus[7], the EC is investigating whether or not Telefonica respected its obligations under the wholesale 4G access obligation.

Melanie Bruneau

Bruneau: One of the biggest mistakes would be to consider that, because a company has adopted internal antitrust policies, nothing else needs to be done. Indeed, continued compliance within the organisation requires regular employee training to ensure every employee at every level understands the requirements to comply with them, continued monitoring and audits.

Undertakings shall build a culture of compliance within the company. In that regard, mixed signals from the senior management concerning the company's actual willingness to implement a compliance programme (e.g. no follow-up after issues are reported, retaliation against reporting employees) often creates a "shield" for infringing behaviour within the company. Ensuring management commitment to enforcing consistent discipline at all levels of the company while outlining disciplinary measures applicable to non-compliant employees is important.

1. *Case C-633/16 EY/KPMG [ECLI:EU:C:2018:371]*
2. *European Commission – Press release (IP/18/3522) – Case Comp/ M. 7993*
3. *European Commission – Press release (IP/19/3429) – Case Comp/ M. 8179*
4. *European Commission – Press release (IP/19/2049) – Case Comp/ M. 8436*
5. *European Commission – Press release (IP/17/1369) – Case Comp/ M. 8228*
6. *European Commission – Press release (IP/17/1924) – Case Comp/ M. 8181*
7. *European Commission – Press release (IP/19/1371) – Case Comp/ M.9003*

Q2. What are the biggest compliance mistakes businesses tend to make?

Another common mistake is adopting antitrust compliance policies and procedures that are unclear and not easily accessible on the intranet of the company. This includes not clearly identifying a go-to person for questions and concerns and not provide a "whistleblower tool" enabling individuals to proactively and anonymously report information or antitrust concerns.

Melanie Bruneau

Solomon: The biggest mistake we see on the day-to-day level is thinking of compliance as the legal team's problem. Compliance should be thought of as the responsibility of the management on the one hand, and of the employees – mainly the sales teams – on the other hand. Companies where the management and sales teams are educated about antitrust and competition laws and are encouraged to approach the legal teams when certain issues arise are far more likely to find and prevent potential breaches in a timely manner.

Talya Solomon

Q3. Have there been any recent regulatory changes or interesting developments?

Salome Cisnal De Ugarte

De Ugarte: (i) On 13 February 2019, the European Parliament, the Council of the European Union and the European Commission reached a political deal on the first-ever rules aimed at creating a fair, transparent and predictable business environment for smaller businesses and traders when using online platforms.[1] This Regulation[2], referred to as the "P2B" Regulation was formally published and will enter into force as of 12 July 2020. Its key features are the following:

- It requires both online intermediation services ("OIS") and online search engine ("OSE") providers to set out the main parameters determining ranking (e.g. any general criteria, processes, specific signals incorporated into algorithms or other adjustment or demotion mechanism used in connection with the ranking) and the reasons for the relative importance of those main parameters.
- P2B requires OIS/OSE providers to be transparent as to any differentiated treatment which they give or may give in relation to goods and services they offer to consumers through their OIS/OSE, as compared to those offered by other business/corporate website users.
- OIS specific: P2B requires OIS providers to ensure greater transparency in their terms & conditions.

(ii) DG Competition joined the ICN framework on competition agency procedures (ICN CAP). The ICN CAP provides a framework based on fundamental principles of procedural fairness in applying competition rules and enables participating authorities to communicate with each other, listen to potential concerns, and respond if there are questions. This in turn will promote transparency and conformity surrounding applying competition governance rules in investigative and enforcement procedures.

1. European Commission – Policy – Platform-to-business trading practices and European Commission – Press release (IP/19/1168) –Digital Single Market: EU negotiators agree to set up new European rules to improve fairness of online platforms' trading practices

Q3. Have there been any recent regulatory changes or interesting developments?

Melanie Bruneau

Bruneau: There have been several notable interesting recent antitrust developments within the EU, including the following:

a. Directive on National Competition Authorities:

EU Directive n°2019/1 seeks to ensure that national competition authorities have the necessary guarantees of independence, resources, enforcement and fining powers in order to apply Articles 101 and 102 of the TFEU in an effective manner. The aim is to ensure that competition in the internal market is not distorted and to avoid that national law might put consumers and undertakings at a disadvantage. EU Member States shall transpose the provisions of the Directive into national law by 4 February 2021 and shall immediately inform the European Commission ("Commission") of their national implementing measures.

b. Digital Single Market – Geo-blocking Regulation:

Regulation 2018/302 of 28 February 2018 (which entered into force on 22 March 2018 and is applicable since 3 December 2018) addresses the issue of unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market. Geo-blocking and other geographically-based restrictions undermine online shopping and cross-border sales by limiting the possibility for consumers and businesses to benefit from the advantages of online commerce. This Regulation provides for three situations where there can be no justified reasons for geo-blocking, namely: the sale of goods without physical delivery; the sale of electronically supplied services; and the sale of services provided in a specific physical location.

c. Antitrust Damages Directive:

Since the deadline of 27 December 2016, all EU Member States have now implemented EU Directive n°2014/104 of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the EU Member States and of the European Union (the "Damages Directive"). The main objective of the Damages Directive was to harmonise and enhance private antitrust enforcement actions in Europe, as the rights to recover damages were already established by case-law but they were not effective in practice. For this reason, the Commission decided to undertake the project of the Damages Directive, thereby laying out the fundamental tenets of private antitrust enforcement actions in the EU.

d. Whistleblower Protection:

On 16 April 2019, the European Parliament approved the new rules on whistleblower protection. Once approved by the Council of the European Union, EU Member States will have two years to implement and comply with the provisions of the Directive. These rules concern ensuring the protection of potential whistleblowers, their safety and that the information disclosed remains confidential by prohibiting reprisals and introducing safeguards to prevent the whistle-blowers from facing retaliation (e.g., suspension, demotion, intimidation). These rules lay down EU-wide standards to protect whistleblowers revealing breaches of EU law in a wide range of areas including public procurement, financial services, money laundering, product and transport safety, nuclear safety, public health, consumer and data protection.

Q3. Have there been any recent regulatory changes or interesting developments?

Talya Solomon

Solomon: On 1 January 2019 Israel passed a major reform in its competition legislation. The name of Israel's main competition legislation was changed from the "Restrictive Trade Practices Law, 1988" to the "Economic Competition Law, 1988", which signifies the recent trend whereby the Israeli Competition Authority (ICA) actively promotes competition rather than simply enforcing the law and preserving existing competition.

More specifically, the reform includes some enhanced enforcement measures – both in terms of the maximum administrative fine, which rose to NIS 100 million (approximately €24 million/$28 million) per offence; and an independent officers' liability: a corporation's officers must take active measures to prevent breaches and shall be held liable for any offence committed by their corporations. These offences also carry custodial sentences.

The reform also included a relaxation of merger-control thresholds, which rose from NIS 150 million (approximately €35 million/$42 million) to NIS 360 million (approximately €85 million/$101 million).

But what is perhaps the most significant change occurred in Israeli unilateral conduct provisions. Prior to the reform, the threshold for an entity to be considered a monopoly was a market share of at least 50%. Now, any entity with "significant market power" can be considered a monopoly even if it has a market share below 50%.An entity with over 50% market share will continue to be considered a monopoly regardless whether or not it has market power.

ICA has recently issued guidelines concerning what will be considered "significant market power", referring to it as "the ability to set inferior supply terms", and analysing both demand-side restraints on market power and supply-side restraints. Demand side considerations include, inter alia, the relevant entity's market share and the level of product differentiation in its field of activity. Supply side considerations include, among other things, economies of scale and scope, capacity limitations, vertical integration in the market, entry risks and network effects.

Q4. What advice would you give to businesses when devising their compliance strategy?

Melanie Bruneau

Bruneau: The key to any successful compliance strategy is to reach the stage where the behaviour required, notably with regards to antitrust compliance, is an indistinguishable part of company culture.

The first step is to have an effective internal compliance programme in place. There is no "one size fits all" model and the particular characteristics of each industry, the market dynamics and relevant national regulations play a key role in designing an effective and efficient programme (e.g. a company not in a dominant position does not have the same issues to consider as a dominant company).

An effective compliance strategy also requires serious support from the top management of the company, to build a culture of legality within the company. It is therefore essential that the company leadership, including the highest levels of management, personally commit the company to adopt and comply with the compliance programme. This commitment can materialise in the form of a charter that shall commit the management.

Once a compliance programme is in place, the monitoring of its effective implementation is essential, as well as introducing internal sanctions for breaches. Therefore, an internal audit/control mechanism tasked with detecting risky practices is required, as well as a specific person responsible for implementing the programme. This person must be independent and only report to the upper management and should have a good knowledge of the substantive aspects of the issues covered by the programme law in order to be able to recognise and detect any questionable practice.

Q4. What advice would you give to businesses when devising their compliance strategy?

Melanie Bruneau

Regular personnel training should be the central focus of a compliance programme, to raise awareness and familiarise all employees with the rules and provide them with the necessary guidance to avoid risky behaviours. All personnel should follow the trainings, and specific categories of personnel may require further training (e.g. personnel likely to make a decision involving the company, sales personnel, employees dealing with government authorities on a regular basis).

On a final note, the compliance programme and its associated training materials absolutely require a good understanding and the company's business, and must speak the language of business-people. The trainings should be made as interesting and engaging as possible (e.g. through networking and case studies), in order to incentivise active participation and optimal understanding from the employees.

Iris Achmon

Achmon: Following recent changes in Israeli definition of dominance, we would suggest to our clients to prioritise locating the fields of activity where their business may be dominant or may have a large market share. Once located, risk assessment should be carried out for these fields through meetings between the business teams and the competition law specialists in the company or outside it, and any potential breaches should be dealt with as soon as possible.

Having completed this assessment, the company may deal with other issues such as reviewing vertical agreements, writing compliance documents and training employees. We assume, of course, that the relevant business is not party to any cartels, as those should most definitely be dealt with first.

Q5. Have there been any noteworthy case studies or examples of new case law precedent?

Salome Cisnal De Ugarte

De Ugarte:

a. Verticals:

EC enforcement shows that territorial restraints and RPM are still hot topics:

- Nike, 2019: the EC has fined Nike €12.5 million for banning traders from selling licensed merchandise to their countries within the EEA. This restriction concerned merchandising products of some of Europe's best-known football clubs and federations, for which Nike held the licence.[1]
- Guess, 2018: the EC fined the clothing company Guess for restricting retailers from online advertising and selling cross-border to consumers in other Member States ("geo-blocking").[2]
- Consumer electronic, 2018: the EC fined in four separate decisions, consumer electronics manufacturers Asus, Denon & Marantz, Philips and Pioneer for imposing fixed or minimum resale prices on their online retailers in breach of EU competition rules.

b. Cartels:

A hot topic concerns the so-called "hybrid settlements".[3] In 2017, the General Court cancelled the EC fine in ICAP case on the grounds that the EC did not take necessary precautions to ensure that the decision, as drafted, does not affect the procedural rights of the parties that opted out and are subject to an on-going investigation. The EC did not

1. European Commission – Press release (IP/19/1828) – Case Comp/AT.40436
2. European Commission – Press release (IP/18/6844) – Case Comp/AT.40428
3. This is where alleged cartel participants engage in settlement discussions with the EC but one or more of the alleged participants opt out of the procedure. The EC may still settle with the willing parties and then follow the "normal" procedure for the parties that opt out of settlement.

Q5. Have there been any noteworthy case studies or examples of new case law precedent?

distinguish, as clearly as possible, between the legal position of the companies that have settled, and that of company which has exercised its right to withdraw from the settlement procedure.

c. Article 102 TFEU:

Salome Cisnal De Ugarte

The enforcement of Article 102 TFEU is mainly focused on tech sector:

- Google online search (Ad Sense), 2019: the EC found that Google has abused its market dominance by imposing a number of restrictive clauses in contracts with third-party websites which prevented Google's rivals from placing their search adverts on these websites. The misconduct included stopping publishers placing search adverts from competitors on their results pages, forcing them to reserve the most profitable space for Google's adverts and a requirement to seek written approval before making changes to how rival adverts were displayed.[4]
- Google search (shopping), 2017: the EC found that Google has abused its market dominance as a search engine by giving an illegal advantage to another Google product, its comparison shopping service (prominent placement by Google of its own comparison shopping service and it has demotion of rival comparison shopping services in its search results). [5]
- Qualcomm, 2018: Qualcomm was fined for abusing its dominant position by preventing rivals from competing in the market for chipsets.[6]
- Amazon e-book (commitment decision), 2017: the Commission opened an investigation in June 2015 because it had concerns about clauses included in Amazon's e-books distributions agreements that could have breached EU antitrust rules. These clauses, often referred to as "most-favoured-nation" clauses, required published to offer Amazon similar (or better) terms and conditions as those offered to its competitors and/or to inform Amazon about more favourable or alternative terms given to Amazon's competitors.[7]

Melanie Bruneau

Bruneau: There have been several notable interesting case-law developments in the recent past within the EU. The most noteworthy are the following:

a. Coty Germany (Selective Distribution):

The issue at stake in this case brought before the Court of Justice of the European Union ("CJEU") was the fact that Akzente – pursuant to its distribution agreement with Coty – had to comply with various provisions in order to preserve the high-end luxury status of the brands covering the products of Coty, including internet sales standards. At Akzente's attempt to sell goods through "amazon.de", Coty sought relief in the court of first instance of Frankfurt am Main, which, in turn, referred the case to the CJEU.

In its judgement, the CJEU held that a clause which, in order to preserve the luxury image of an undertaking, prevents an authorised distributor from using a third-party website discernible to the public is not in violation of competition law, if the clause complies with certain conditions, namely (i) the resellers are chosen on the basis of objective criteria of a qualitative nature which are determined uniformly for all and applied in a non-discriminatory manner for all potential resellers, (ii) the nature of the product in question, including the prestige image, requires selective distribution in order to preserve the quality of the product and to ensure that it is correctly used, and (iii) the criteria established do not go beyond what is necessary.

4. European Commission – Press release (IP/19/1770) – Cases Comp/AT.40411.
5. European Commission – Press release (IP/17/1784) – Cases Comp/AT.39740.
6. European Commission – Press release (IP/18/421) – Cases Comp/AT.40220.
7. European Commission – Press release (IP/17/1223) – Cases Comp/AT.40153.

Q5. Have there been any noteworthy case studies or examples of new case law precedent?

Melanie Bruneau

b. Privacy case against Facebook in Germany:

On 7 February 2019, the German Federal Cartel Office ("FCA") issued a prohibition decision against the social network Facebook. Following an investigation that had started in March 2016, the FCA found that the company had abused its dominant position on the market for social networks by collecting user data from third parties' websites and from its own services (e.g. from its own messaging app) without consent.

Under EU and national competition law, it is not illegal to hold a dominant position (typically when the company's market share is 40% or more), since a dominant position can be obtained by legitimate means of competition. However, a dominant company is prohibited from abusing this position to eliminate competition. The FCA concluded that this conduct resulted in an exploitative abuse as it directly affected the social media network users due to the loss of control over how their personal data is used.

c. Prohibition of the Siemens/Alstom merger by the European Commission:

On 11 June 2019, the European Commission ("Commission") prohibited the proposed transaction following an in-depth investigation (i.e., Phase II). The proposed 50/50 joint venture would combine the European flat carbon steel businesses of both parties as well as the steel mill services business of one of them. In its decision to open a Phase II, which the Commission opens at the end of Phase I, the Commission expressed concerns that, post-transaction customers in the packaging and the automotive industry would face a reduced choice in suppliers, as well as higher prices. The parties' proposed remedies did not remove such concerns.

It is worth mentioning that the Commission notably considered that the elimination of relevant suppliers in the steel industry would not be remedied by imports. This is due to the fact that the requirements of car manufacturers and packaging manufacturers are too sophisticated for steel suppliers from non-EU countries. With respect to metallic coated and laminated steel products for packaging, the Commission noted that the transaction would create a market leader in an oligopolistic environment. The Commission also noted that, for both the automotive and the packaging industry, the proposed remedies did not include any upstream assets for intermediate steel products.

d. Case of restriction of cross-border sales against AB/InBev:

On 13 May 2019, the Commission issued a decision imposing a €200m fine on the world's largest beer brewer for abusing its dominant position in the Belgian beer market. In this case, the Commission found that AB/InBev infringed Article 102 TFEU notably by preventing cross-border sales of beer within the EU and notably by hindering supermarkets and wholesalers to buy and to import beer in Belgium from the Netherlands at a lower price thereby placing them at a competitive disadvantage.

In its investigation, the Commission highlighted that the Company' strategy was achieved through a number of restrictive practices, such as: (i) altering the beer packaging and removing mandatory information for consumers,(ii) restricting supplies of beer to the Netherlands so to limit imports to Belgium, (iii) limiting the sale of product to Belgian retailers subject to their agreement to limit imports from the Netherlands, and (iv) making customer promotions in the Netherlands conditional upon not offering the same promotions to customers in Belgium.

Q6. What areas of litigation currently rank highest on competition and antitrust regulators agenda?

Salome Cisnal De Ugarte

De Ugarte: The EC remained focused on the tech digital sector and more specifically article 102 TFEU investigations in relation to digital platforms. A notable example includes the recent formal opening of an investigation by the EC against Amazon on 17 July 2019.[1] As part of its in-depth investigation the EC released that it will look into the following:

- The standard agreements between Amazon and marketplace sellers, which allow Amazon's retail business to analyse and use third party seller data. In particular, the EC will focus on whether and how the use of accumulated marketplace seller data by Amazon as a retailer affects competition.
- The role of data in the selection of the winners of the "Busy Box" and the impact of Amazon's potential use of competitively sensitive marketplace seller information on that selection. The "Buy Box" is displayed prominently on Amazon and allows customers to add items from a specific retailer directly into their shopping carts.

The General Court is currently reviewing Google's appeal against the EC decision in relation to Google Shopping. In parallel, on 5 June 2019, Google filed an application against the EC AD Sense decision (€1.49 billion fined imposed in relation to alleged restrictive clauses in Google's contracts with major sites that use its ad platform).

On 18 July 2019[2], the EC fined Qualcomm €242 million for an alleged abuse of its dominant position in 3G baseband chipsets.[3] The EC took the view that Qualcomm sold below cost with the aim of forcing its competitor Icera out of the market.

The EC concluded that Qualcomm held a dominant position in the global market for UMTS baseband chipset between 2009 and 2011 (approx. 60% market shares with high entry barriers).

Further, the EC found that Qualcomm abused this dominance by engaging in "predatory pricing", selling certain quantities of three of its UMTS chipsets below cost to Huawei and ZTE, two strategically important customers, with the intention of eliminating Icera, its main rival at the time in the market segment offering advanced data rate performance.

Melanie Bruneau

Bruneau: In regards to vertical agreements, recently much focus has been on resale price maintenance ("RPM") cases at national level. In fact, in 2019 alone, the following cases have been decided and have all resulted in fines for the concerned parties: HM Products Benelux (Belgian Competition Authority), ZEG (German Competition Authority), Icon Hairspa (Danish Competition Authority), Husqvarna Magyarország (Hungarian Competition Authority), Super Bock (Portuguese Competition Authority).

Furthermore, the CJEU decision in "Coty Germany" on selective distribution represented a significant precedent in this area. The European Commission ("Commission") has also initiated a number of investigations into vertical restraints imposed by companies in a variety of sectors, as described below.

Additionally, the Commission ran a wide-ranging public consultation from 4 February 2019 until 27 May 2019 on the Vertical Block Exemption Regulation ("VBER"), in force since 2010. The purpose of the review is to allow the Commission to determine whether it should let the VBER lapse, prolong its duration or revise it. The 2010 VBER exempts certain vertical agreements from EU antitrust rules. In particular, it provides for a safe harbour if the parties' market share does not exceed 30% and the agreements do not contain any of the hardcore restrictions set out in the VBER. The public consultation, which is part of the evaluation of the VBER, aims, as such, to collect evidence and views from stakeholders.

1.European Commission – Press release (IP/19/4291) – Cases Comp/AT.40462.
2. European Commission – Press release (IP/19/4350) – Case 39711.
3. Baseband chipsets enable smartphones and tablets to connect to cellular networks and are used both for voice and data transmission. This case concerns chipsets complying with the Universal Mobile Telecommunications System ("UMTS"), the third generation ("3G") standard.

Q6. What areas of litigation currently rank highest on competition and antitrust regulators agenda?

Melanie Bruneau

In regards to mergers, over the past decade, the Commission has approved over 3,000 notified transactions and blocked only 10. However, the number of prohibition decisions is rising as out of these 10 decisions, three have been adopted since February 2019, namely Siemens/Alstom, Tata Steel/ThyssenKrupp, Wieland/Aurubis/Schwermetall. The growing number of prohibition decisions demonstrates how important it is for companies seeking approval of merger activities to craft remedies that ensure that consolidation does not lead to consumer harm, for example via higher prices or less innovation. This requires careful, strategic thinking by the parties at an early stage of the notification process in order to address timely and effectively the Commission's competition concerns during the review process in order to secure clearance.

Another area of interest in the regulator's agenda is digital and ecommerce sectors. Regarding ecommerce, in 2017 the Commission concluded a sector inquiry that looked into companies' practices regarding consumer goods and digital content. Following this sector inquiry, the Commission has initiated a number of investigations into vertical restraints imposed by companies in a variety of sectors.

In the digital sector, the Commission has recently issued various decisions and opened investigations concerning major search engines, chip manufacturers and concerning online marketplaces. Furthermore, the digital and ecommerce sectors received additional safeguards with the coming into force of EU Regulation 2018/302 on geo-blocking.

Talya Solomon

Solomon: The ICA shows increasing interest in monopoly and unilateral conduct. At least three abuse of dominance cases are currently being deliberated in the Israeli Competition Tribunal, and others are in hearing procedures.

Other subjects being litigated by the ICA in the Competition Tribunal are appeals on the ICA's decisions to block mergers, inter alia in the fields of banking and communications.

The ICA does not have to litigate to object a merger or impose an administrative fine – litigation mostly occurs when other parties appeal the ICA's decision.

Q7. What impact has the rise of technology and ecommerce had on the competition and anti-trust landscape?

Salome Cisnal De Ugarte

De Ugarte: To answer the challenges that competition policy faces due to digitisation, Commissioner Vestager appointed a panel of three advisers from outside the Commission. The panel was made up of Professors Heike Schweitzer, Jacques Crémer and Assistant Professor Yves-Alexandre de Montjoye. They were working on a report on the future challenges of digitisation for competition policy, delivered on 31 March 2019. The report is entitled *Competition policy for the digital era*. The report considers the application of antitrust rules to platforms and data, the impact of the digital field on the EU merger control rules.[1]

Ecommerce is probably going to have a great impact on the future Vertical Block Exemption Regulation. The European Commission published its "*Factual summary of the contributions received in the context of the open public consultation on the evaluation of the Vertical Block Exemption Regulation [VBER] (EU) No 330/2010*". Many of the respondents share the view that the VBER needs to be changed or at least clarified.

1. Competition policy for the digital era, A report by Jacques Crémer, Yves-Alexandre de Montjoye, Heike Schweitzer

Q7. What impact has the rise of technology and ecommerce had on the competition and anti-trust landscape?

Salome Cisnal De Ugarte

With relation to the question whether there are other areas for which the VBER and/or the Vertical Guidelines provide insufficient legal certainty, the respondents specified particular areas, such as "new ways of distribution over the internet, the treatment of 'most favoured nation' or 'price parity' clauses, restrictions on the purchasing of keywords for the purposes of online advertising and vertical restrictions imposed by intermediaries."[2]

Furthermore, the recent cases of the EC cited in questions five and six also evidence that with the growing importance of technology and ecommerce, the number of cases related to the tech industry and ecommerce is growing as well.

Melanie Bruneau

Bruneau: As regards the ecommerce sector, there have been significant developments in the European Union following the 2017 ecommerce enquiry and the entry into force of the Geo-blocking Regulation.

The last few years saw multiple investigations conducted by the European Commission ("Commission") in the technology and ecommerce sectors, below there are a few examples of investigations, closed and on-going:

Search engine Google has been fined in three separate investigations (AdSense, Search and Android) for a total of €8.25 billion as the Commission found that Google acted contrary to European competition law rules.

In the AdSense case Google was fined €1.49 billion for abusing its market dominance which was achieved by imposing certain restrictive clauses in agreements with third-party websites. These clauses prevented Google's rivals from placing their search adverts on the third-party websites. Google was also fined €2.42 billion for abusing its market dominance as a search engine by giving an illegal advantage to Google Shopping, Google's own comparison shopping service.

In the Google Android investigation, the Commission fined the search engine €4.34 billion for imposing illegal restrictions on Android device manufacturers and mobile network operators which were put into place in order for Google to solidify its dominant position in general internet search.

Furthermore, the Commission has recently opened an investigation into a global platform in order to assess whether the sensitive data from independent retailers selling on the marketplace are used in breach of EU competition rules. In order to assess whether there has been a breach of EU competition rules, the European Commission will look into the standard agreements between platforms and marketplace sellers and into the role of data in the use of the marketplace.

Additionally, in early 2019 the Commission sent a Statement of Objections to Valve, owner of the PC video game distribution platform Stream and to PC video game publishers Bandai Namco, Capcom, Focus Home, Koch Media and ZeniMax. The Commission informed of its preliminary view that the concerned companies are in breach of EU competition rules by preventing consumers to purchase videogames cross-border from other EU Member States. The Commission is concerned that these companies use geo-blocking activation keys to prevent cross-border sales and that their agreements with distributors include contractual export restrictions.

2. European Commission, DG Comp: Factual summary of the contributions received in the context of the open public consultation on the evaluation of the Vertical Block Exemption Regulation [VBER] (EU) No 330/2010

Q7. What impact has the rise of technology and ecommerce had on the competition and anti-trust landscape?

Achmon: Israel's economy leans heavily on technology and start-up companies. Israeli Competition Commissioner stated on several occasions that Israel will not attempt to be a leader in the application of competition law to the technology fields, and that she intends to adopt a "me too" strategy and follow the future policies of major jurisdictions. She also noted that if ICA takes any measures, they will be locally focused and aimed at solving competition issues in Israel only.

Iris Achmon

In its recent opinion on significant market power, the ICA referred, for the first time, to double-sided markets and network effects as special cases deserving a slightly different analysis. While these two economic phenomena are not unique to technology sectors, they have definitely become more prevalent and more important in recent years.

Q8. What advice would you give to multinationals considering entering your jurisdiction?

Bruneau: Most companies wishing to conduct business in the EU will need to establish a base in at least one of the 27 EU Member States (also true for companies based in the UK after the UK's exit of the EU). The choice of the EU Member State(s) of establishment requires careful consideration of many important factors, including those described below:

i. Select a business-friendly territory:

Melanie Bruneau

Certain types of EU regulations apply on a "country of origin" basis, meaning a business established in one EU Member State can take advantage of the local regulatory regime even when selling products and services into other EU territories. Selecting a Member State with a favourable regulatory regime is critical to successful expansion.

ii. Choose the right distribution model:

The use of agents and distributors is widespread in Europe but regulated both by EU and national laws. Agency agreements can require goodwill compensation upon termination, while buy/sell distributor models attract antitrust restrictions notably on pricing controls/resale price maintenance.

iii. Contract localisation:

Any business transacting with European consumers needs to understand the different consumer law regimes in force across EU Member States in which its customers are located. Many commonplace terms implemented elsewhere (e.g. U.S. consumer contracts) are not enforceable under EU laws, meaning consumer contracts require careful review and localisation.

iv. Data protection:

The EU has a very strict data protection framework. Complex rules govern every aspect of the data life cycle, impacting record retention conditions, when and how businesses can send marketing communications, use website cookies, or even the choice of location of data centres. It is therefore imperative to take data protection considerations into account in any company decision.

Q8. What advice would you give to multinationals considering entering your jurisdiction?

Iris Achmon

Achmon: New competition is welcome in Israel, and the ICA's enforcement is normally focused on local businesses. Nonetheless, if a new multinational expects to have a high market share, they should familiarise themselves with local rules of unilateral conduct, and estimate whether they will be considered a "monopoly".

Industry-specific competition legislation should be considered as well. For example, Israeli food retail sector has a specific law which regulates the competitive behaviour of suppliers and retailers in excruciating detail. The vehicle market has some competition-related prohibitions, and the like.

Q9. What steps should a business take to ensure their mergers are approved by regulators?

Salome Cisnal De Ugarte

De Ugarte:

a. Pre-notification discussions:

Businesses should bear in mind that the formal notification (and subsequent official Phase I procedure of 25 working days) only starts to run once the FormCO is complete and that the EC may issue declaration of incompleteness in case it is not satisfied it has all the elements to start its review.

Recent experience shows that pre-notification discussions are lengthier and can take up to six months in the most complex cases. As a result, businesses (i) should take into account this factor when drafting the SPA and implementing the long-stop date in their agreement, or (ii) in strategic/complex cases, prefer lengthy pre-notification discussions to mitigate the risk of incompleteness and/or launching of Phase II investigations.

b. Coordination with different authorities and timing of multiple notifications:

Ensure you engage in a proper filing strategy coordinating key milestones. Bsuinesses need to take into account differences in filing regimes (some jurisdictions have potentially particularly long pre-notification processes e.g. Brazil, Chile or tend to send multiple RFIs: South Korea where once filing is accepted the 30 days statutory time period is only tentative).

Coordination with authorities is important. In presence of transactions involving multiple filings, communicate updates and clearances to small authorities which tend to follow the EC or US authorities (for instance, Brazil and other LATAM authorities are influenced by the US timing). Do not hesitate to open an informal line of communication with different authorities via local counsel as appropriate.

c. Remedies discussions:

If remedies appear inevitable (i.e. if the EC raises concerns following pre-notification discussions or following market investigation), engage as soon as possible with the EC and come up with a proposal (in Phase I, deadline of 20 working days after notification).

d. Internal resources:

Throughout the process, businesses should ensure there is a key point of contact from business (outside the legal team) in the loop of the antitrust discussions dedicating time to review draft notifications and RFI responses and eventually attending meetings at the EC premises if necessary.

Q9. What steps should a business take to ensure their mergers are approved by regulators?

Melanie Bruneau

Bruneau: A proactive and well-coordinated strategy is indispensable in order to maximise the chances that a proposed merger will be approved by the European Commission. Successful merger applicants will often have considered the following issues:

Early anticipation of potential competition issues and possible remedies:

It is important that information is obtained at the earliest stage to assess the existence and the extent of potential competition problems the proposed merger could raise, and to devise a strategy for dealing with them. For example, if competition issues are confined to particular markets, it may be possible to identify early on clear remedies which can be offered to the European Commission, without compromising the commercial value of the deal. This needs to happen as early as possible, given the tight deadlines for merger review, to allow for meaningful consideration.

Early engagement with the case team:

It is generally advisable to engage in pre-notification discussions as soon as possible and to submit a draft notification before filing. This usually helps to ensure that a filing is complete on notification, and also may prove useful to address some (or all) of the case team's potential concerns before a formal notification is made.

Taking into account third parties' concerns:

A proposed merger may encounter opposition from various stakeholders (e.g. customers, suppliers and competitors) who are likely to be consulted by the European Commission. It is therefore important to anticipate and such reactions and prepare arguments in response to the concerns such third parties may raise.

Establishing a good relationship with the case team:

This can prove very important to ensure an as-smooth-as-possible process, especially if the proposed merger is likely to raise competition issues. The best way to achieve this is to provide timely, accurate, clear and consistent information to the case team, in order to avoid further information requests (causing unnecessary delays) and avoid damaging their goodwill.

Iris Achmon

Achmon: Businesses should consider the competitive questions at early stages, when constructing the transaction, just like they would tax or corporate considerations. Finding out close to signing that a transaction raises competition issues, and its structure must be revised, is not only disappointing, but may cost the parties time and money.

In some cases, particularly with regard to horizontal mergers with high market shares, it is advisable for the parties to engage a specialist competition economist to prepare their case and economic narrative in advance.

And of course, as always when approaching government authorities, bona fide arguments and honest reporting of facts are key to maintaining the ICA's trust and avoiding unnecessary requests for information, which delay the review procedures. Israel has criminal sanctions for providing misleading or untrue information, so this is particularly important.

Q10. What action should a company take if it uncovers a potential antitrust/competition breach? Are companies encouraged to self-report any wrongdoing?

Salome Cisnal De Ugarte

De Ugarte: The first action to be taken is to stop the infringement at the earliest possible stage: an already existing compliance strategy can enable the company to take appropriate measures.[1]

The EC has different programmes encouraging the self-reporting and the cooperation of undertakings involved in an infringement of EU competition rules:

a. Leniency programme:

- The programme offers undertakings involved in a cartel prohibited by Article 101 TFEU either total immunity from fines or a reduction of fines which the EC would have imposed on them. Immunity or reduction is granted in exchange of self-reporting or handing over evidence.[2]
- Full immunity can be granted to the company who was the first to denounce a secret cartel or to provide the EC with sufficient corroborative evidence.[3]
- Undertakings filing their leniency application after the first undertaking qualified for immunity can only obtain a maximum of 50% reduction of the fine to be imposed on them.[4]

b. Settlement procedure:

- The procedure is used to speed up the adoption process of a cartel decision. The parties, in return of a 10% reduction in the fine, admit to the EC's objections. It establishes the infringement and requires an admission of guilt from the parties.[5]
- Settlement is only available in cartels. It requires a cease and desist of part behaviour, but does not require any commitments for future behaviours.[6]

c. Commitment decisions:

- The instrument can be considered by the EC when the undertakings are willing to offer commitments removing initial competition concerns; imposition of a fine would not be appropriate and efficiency reasons justify not issuing a formal prohibition decision.[7]
- The commitment decision does not say if there was a breach of EU competition rules or not. The commitments undertaken can be behavioural or structural and may be limited in time.[8]

d. Antitrust cooperation:

- The cooperation in antitrust cases other than cartels is assessed on a case-by-case basis. If the case is not suited for a commitment decision, and it is not a cartel case, the antitrust cooperation can be the means to reward cooperation.[9]
- There is no structured framework to reward cooperation, but it is possible within the framework of the EC's 2006 Fining Guidelines.[10]
- The level of fines reduction depends on the extent and timing of the cooperation in the case and the resulting benefits thereof.[11]

1. European Commission, DG Competition: Compliance matters. What companies can do better to respect EU competition rules, 2013.
2. European Commission's website concerning Leniency
3. European Commission, DG Competition: Compliance matters. What companies can do better to respect EU competition rules, 2013.
4. European Commission, DG Competition: Compliance matters. What companies can do better to respect EU competition rules, 2013.
5. European Commission's website concerning Settlement
6. European Commission's website concerning Settlement
7. European Commission's website concerning Commitment decisions
8. European Commission's website concerning Commitment decisions
9. European Commission Factsheet: Antitrust: reduction of fines for cooperation.
10. European Commission Factsheet: Antitrust: reduction of fines for cooperation.
11. European Commission Factsheet: Antitrust: reduction of fines for cooperation.

Q10. What action should a company take if it uncovers a potential antitrust/competition breach? Are companies encouraged to self-report any wrongdoing?

Melanie Bruneau

Bruneau: Article 101 cases can notably originate from a leniency application from one of the participants to a cartel. Under the European Commission's Leniency programme, companies are encouraged to self-report any wrongdoing. This leniency policy also benefits the European Commission ("Commission") as in this way it will be able to obtain information and evidence of the cartel infringement. In order for companies to benefit from leniency, companies must approach, directly or through their legal counsel, the Commission.

Pursuant to the Notice on immunity from fines and reduction of fines in cartel cases (OJ 2006 C298/ 11) and on the guidelines on the method of setting fines published by the European Commission in 2006 (2006/C 210/02), companies that participated in illegal cartels (but not vertical restraints) have the opportunity to avoid or have a reduced fine if they provide information to the Commission.

A cartel participant will benefit from full immunity from administrative penalties provided that certain conditions are satisfied, inter alia, the undertaking submits information and evidence in relation to the alleged cartel first, the information and evidence submitted enables the Commission to either conduct a targeted inspection in relation to the alleged cartel or find an infringement connected to the cartel in question of Article 101 of the TFEU; and the applicant did not inform others that it has applied for immunity.

If a company does not qualify for immunity it may still benefit from a reduction of fines if it provides evidence that represents "significant added value" to that already in the Commission's possession and have terminated their participation in the cartel. Evidence is considered to be of a "significant added value" when it reinforces the Commission's capacity to prove the infringement. The first company to meet these conditions is granted 30 to 50% reduction, the second 20 to 30% and subsequent companies up to 20%.

Regarding the actions that a company should take if it uncovers a potential antitrust breach, the response may depend on the scope, nature and severity of the uncovered infringement:

In case of potentially major/widespread infringements e.g. that could constitute a cartel, it is advisable to report as early as possible to competition authorities in order to maximize the chances to benefit from the leniency procedure and obtain a reduction or exemption from any fine.

This is even truer in light of the adoption of reinforced protection for potential whistle-blowers (see question 3 above), which increases the risk that any infringement discovered internally may not remain confidential if no actions are taken by the management.

Subject to legal advice, minor and isolated infractions discovered during a compliance audit or reported by an employee may not justify self-reporting to competitions authorities.

Talya Solomon

Solomon: The first thing to do is to immediately cease the breach, and take measures to prevent its recurrence. In some cases, the breaching company should take disciplinary measures against the employees or managers involved.

Self-reporting should be considered based on the specific circumstances and type of breach. The ICA encourages self-reporting in at least two ways: for cartels, ICA has a leniency programme that provides full immunity from criminal procedures to the first person to provide information about a previously unknown cartel; for breaches that are mostly subject to administrative fines (such as merger transaction gun-jumping or monopoly breaches) – self reporting will be taken into account when determining the size of the fine, but will not grant immunity.

Q11. What key trends do you expect to see over the coming year and in an ideal world what would you like to see implemented or changed?

Melanie Bruneau

Bruneau: We expect some important changes and key trends over the coming year.

The European Parliament elected Ursula von der Leyen President of the next European Commission ("Commission"). EU Member States' heads of state or government will propose their candidates for members of the Commission. The full college of Commissioners, including the future Commissioner for Competition replacing Commissioner Vestager, will then be elected by Parliament. The future Commission is set to take office on 1 November 2019 for a five-year term.

The role of EU competition law policy and enforcement is expected to be particularly relevant in the context of market digitisation and digital economy. The special advisers report on "Competition policy in the digital era"[1] which was published on 4 April 2019 (the "Report") underlines that data acquired as technology has made it possible for companies to create new forms of power which make it more difficult for market entrants to effectively compete. Whether these challenges should be addressed by competition law, by a regulatory regime or by non-market power-related rules is unclear. However, competition law spirit and design is to react to changing markets. As a result, competition and regulation are not substitutes but could reinforce each other.

The Commission will continue to review the issue raised by so-called "killer acquisitions" where tech giants buy start-ups and investigate whether adding thresholds would be the right way further. In practice, small start-ups value and competitive potential may not be reflected in their turnover. This means that a merger might not be caught under the EU merger thresholds. We expect that the Commission will review whether to adjust the EU Merger Regulation[2] to address these concerns.

The need to review the EU Merger Regulation rules in the context of the question of European Champions was raised by France and Germany in February 2019 in a manifesto for a European industrial policy fit for the 21st century, after the Alstom-Siemens merger was blocked by the Commission. Commissioner Vestager defended the need for the EU to see European champions succeeding in global markets although this should not be the result of mergers that harm competition by putting aside EU competition rules. France, Germany and Poland are now asking for the introduction of greater flexibility to take into account competition at global level when mergers are scrutinised according to a joint paper released on 4 July 2019 to "modernise EU competition policy".

Talya Solomon

Solomon: The ICA is promoting new regulations which, hopefully, will relax the filing thresholds and streamline the filing procedures. We expect to see an escalation in the aggressive enforcement trend, in light of the recent increase in maximum fines. We also expect the trend of follow-on and excessive pricing class actions, which are currently very popular among plaintiffs, to continue.

In an ideal world, we would like to see a specialist tribunal or legal instance devoted to economic civil litigation, which will have specific expertise in competition law. Currently, it is nearly impossible to receive interim relief based on competition law claims, and the courts tend to avoid such claims in civil decisions even in their final decisions. The lack of expertise therefore significantly harms private enforcement. The idea of a specialist legal instance for civil competition law claims has been raised in discussions between ICA and various stakeholders in the market, and hopefully will be promoted by the ICA.

1. Report on "Competition policy in the digital era" prepared by J.Crémer, Y. de Montjoye and H. Schweitzer
2. EU Regulation No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings

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